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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 490.

AUGUSTA M. TURNER,
Petitioner,

v.

CARL A. LUER, WILLIAM J. LUER, HERMAN F. LUER,
Respondents,

ALTON BANKING AND TRUST COMPANY, a Corporation,
Executor of the Last Will and Testament of
August Luer, Deceased,
Intervening Respondent.

REPLY OF RESPONDENTS

To the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit,

and

BRIEF IN SUPPORT THEREOF.

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To the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Because petitioner's "statement of the matter involved" is not accurate, it is necessary for the respondents briefly to set forth such facts and rulings as are material to the issues presented by the petition.

STATEMENT OF FACTS.

This is an action in equity, brought by the petitioner, Augusta M. Turner, of University City, Missouri, on September 27, 1943, against the respondents, Carl A. Luer, William J. Luer and Herman F. Luer of Alton, Illinois. The respondents are brothers of the petitioner. By her action, petitioner seeks to have construed as irrevocable

and still valid and in effect a certain trust instrument executed by the father of the litigants, August Luer, on February 17, 1930. In their answer the respondents admit the execution of the trust, but allege that their father revoked and destroyed it in January of 1933. They deny that the trust was irrevocable.

The respondents were appointed trustees under the trust, and the beneficiaries were August Luer himself and his wife, Helen Luer, as life tenants, and at their deaths their five children, Augusta M. Turner (the petitioner), Helen Peterson, Carl A. Luer, Herman F. Luer and William J. Luer, took the trust estate in equal shares.

The property conveyed in the trust consisted of 95 shares of stock of Luer Building Company, 150 shares of stock of Alton Storage and Hotel Company, and one promissory judgment note, dated February 17, 1930, in the sum of $56,993.94, payable to August Luer, and signed by the petitioner, Augusta M. Turner.

The shares of stock and the note were not delivered by August Luer to the trustee sons until December 1, 1932, at which time one certificate of stock for 95 shares in Luer Building Company and six certificates for 25 shares each in Alton Storage and Hotel Company were issued to the sons as trustees. All of these certificates were assigned and transferred back by the trustee sons to their father one month later on January 3, 1933. The promissory note for $56,993.94, executed by the petitioner, Augusta M. Turner, also was assigned back to the father, August Luer.

August Luer died September 22, 1942, in Madison County, Illinois. Alton Banking and Trust Company, intervening defendant, is the executor of his last will and testament. In its answer the bank alleges that proceedings had been instituted in the Probate Court of Madison County, Illinois, and that on December 3, 1942, an inventory of the estate was filed and regularly approved. On May 21, 1943, a petition was filed in the Probate Court, to

sell the assets of the estate at public sale, notice of the hearing on the petition to sell was given to the petitioner, Augusta M. Turner, and at her request several continuances were granted by the Probate Court. On June 7, 1943, a hearing was held and an order of sale was entered. The public sale was held and a report thereof approved without objection or appeal by Augusta M. Turner. Authenticated copies of the probate court proceedings are attached to the bank's answer (R. 48 through 72).

The foregoing facts are set forth in points I, II, III and IV of the "Findings of Fact and Conclusions of Law" of the United States District Court in which this case was tried (R. 229, 230). In her assignment of error on appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the petitioner herein, Augusta M. Turner, did not question these points.

The trial court further found that August Luer, between December 1, 1932, and January 3, 1933, revoked the trust in question and destroyed the original and copy of the trust instrument, which he had executed February 17, 1930. He found that the petitioner herein, Augusta M. Turner, had failed to establish by the evidence that such action on the part of August Luer was without authority and void, but that she, by her conduct, accepted such revocation of the trust as valid and binding upon all parties (R. 231).

The trial court further found that the petitioner had knowledge of the destruction of the trust instrument and the return of trust assets to her father, August Luer. During a period from 1930 until after 1937 she was the owner of stock in Luer Building Company, and her father, during this same period, was continuously president of the company. She frequently signed proxies for him to vote her stock at annual stockholders' meetings. On June 29, 1933, and on May 29, 1935, she signed "waiver agreements" with her father and the other stockholders of the company which were headed, "We, the undersigned, being all of the stock-

holders of Luer Building Company, etc." On May 29, 1935, she personally attended the annual stockholders' meeting of the Luer Building Company, which meeting was attended by all stockholders. None of the respondents attended any of these meetings, either as trustees, stockholders or otherwise. By reason of the foregoing, the trial court found that the petitioner, Augusta M. Turner, by and through the "waiver agreements" and her attendance at stockholders' meetings had notice and knowledge of the revocation of the trust instrument and the resumption of control and ownership of the stock of Luer Building Company by her father, August Luer; that "between the time of the revocation of the trust in January, 1933, and the death of her father in September, 1942, the plaintiff (petitioner) did not complain or otherwise object to such revocation" (R. 231).

The trial court further found that the petitioner had received full and adequate notice of the proceedings in the Probate Court of Madison County, and that after the death of August Luer, all the trust property was inventoried as assets of his estate. On the filing of a petition to sell these assets at public sale she appeared in the Probate Court, and she had knowledge that the assets to be sold included the stock which had been conveyed in the trust instrument on February 17, 1930. Notwithstanding such knowledge, she did not protest, but allowed the stock to be sold at public sale, and she did not thereafter file any objection to the report of said sale or to its approval by the Probate Court of Madison County, Illinois (R. 232).

The trial court further found that the petitioner, Augusta M. Turner, prior to filing her action in the United States District Court, intervened in a certain action pending in the Circuit Court of Madison County, Illinois, and sought to have certain judgments of the Circuit Court of Madison County, Illinois, vacated. In support of her motion to vacate she attached her affidavit reciting, in effect, all the

matters which are set forth in her complaint in the United States District Court. In the proceedings in the Circuit Court of Madison County, Illinois, the motion filed by the petitioner was denied and she did not prosecute any appeal from the order denying her motion (R. 232).

From the foregoing finding of facts the trial court concluded as a matter of law:

> "1. That plaintiff (petitioner) has failed to prove the material allegations of her complaint.
>
> "2. That the revocation by August Luer of the trust instrument in question was an effective and valid revocation for all purposes.
>
> "3. That in any event plaintiff (petitioner) is by her conduct estopped from now asserting the existence of a valid trust.
>
> "4. That plaintiff (petitioner) is not entitled to the relief prayed for in her complaint" (R. 232, 233).

On July 11, 1944, a judgment order was entered in the District Court dismissing the complaint of Augusta M. Turner for want of equity, and on October 6, 1944, she filed an appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

On April 24, 1945, the Circuit Court of Appeals for the Seventh Circuit filed in the office of the Clerk the opinion of the Court affirming the judgment of the District Court.

The opinion is short. As petitioner says on page 7 of her Petition herein, "The Opinion of the Circuit Court contains neither citations, references to appellant's authorities nor legal reasoning or explanation for disregarding Illinois law or the genesis of the announced unwritten 'general law.' "

A careful examination of petitioner's Petition will fail to disclose just what "general law"—as contrary to the

law of Illinois—is announced in the opinion of the Circuit Court of Appeals, unless it be in the paragraph in the opinion that * * *

> "On the issue of irrevocability, the trial judge announced orally:
>
> "'I don't think there is evidence here that the Court would be justified in undertaking to find that this trust instrument was not under any circumstances irrevocable. * * * I do not hardly feel I could possibly as a finding of fact here conclude there was any such trust instrument as contended for by the Plaintiff in her complaint. I think her evidence falls short of the degree of proof the Court must have to reconstruct this trust instrument. I think she is not at fault being unable to produce anything, but on the other hand the circumstances all indicate here **that the trust was terminated by her agreement** (emphasis ours). I think the circumstances clearly indicated, I thought they did on the motion for the summary judgment on the documentary proof of what transpired in the Probate Court the other day would rather indicate she acquiesced in its termination. It may be such a trust they could not terminate on agreement, but I have no evidence it was such a trust instrument as that'" (R. 252).

* * * * * * *

Not only is petitioner's "statement of the matter involved" highly inaccurate with reference to facts, but it also is argumentative and frequently erroneous with reference to propositions of law. These we will consider more fully in our brief.

AS TO PETITIONER'S "QUESTIONS."

The three "questions" posed on page 8 of the Petition herein, as to whether the doctrine of Swift v. Tyson should be re-established, are wholly without foundation in the

record in this case. As a matter of fact, the application of the legal principles laid down by Mr. Justice Brandeis in Erie R. Co. v. Tompkins to the status of the petitioner, Augusta M. Turner, will do her a lot more harm than good. This also is a matter for discussion in the brief.

AS TO PETITIONER'S REASONS RELIED UPON.

I.

The decision of the Circuit Court herein does not establish any unwritten general rule of law of trust contrary to the common law and applicable local law of Illinois. The decision merely holds that the trust created by August Luer in 1930 was revoked by him in 1932, 10 years prior to his death, and that the petitioner had knowledge of such revocation and acquiesced therein.

II and III.

The decision does not resurrect the doctrine of Swift v. Tyson which was overruled in Erie v. Tompkins, because the decision announces no new "general law" of trusts, but on the contrary is founded solidly on both Illinois and Federal laws and is entirely in harmony with such laws. The only rule laid down by the decision is that the trust in question could be and was revoked by the consent of the parties in interest.

IV.

The petitioner does not point out in any respect wherein the decision is applicable to the "Federal Gift Tax Statute."

V.

The decision is no more in conflict with other Federal Courts than it is with the laws of Illinois. The decision does not hold that any trust is presumed to be revocable.

It simply holds that the trust in question was revoked by August Luer, father of the petitioner, and that the petitioner had knowledge of such revocation and consented thereto, or by her actions acquiesced in such revocation.

VI.

The decision does not conflict with the laws of Illinois. It does not attempt to pass upon the presumption that a voluntary trust is irrevocable, but holds only that it can be revoked by the consent or acquiescence of the parties. The decision properly holds the petitioner was estopped by her own conduct to deny or question the revocation of the trust by her father 10 years prior to his death.

CONCLUSION.

It is sufficient to say here that with reference both to petitioner's "questions" and her "reasons relied upon for allowance of writ," that the decision of the Circuit Court of Appeals for the Seventh Circuit herein does not establish an unwritten "general law" contrary to the local law of Illinois, and does not resurrect the doctrine of Swift v. Tyson which was overruled in Erie R. Co. v. Tompkins. It does not conflict with decisions of the Illinois courts, or with the common law in Illinois or with decisions of other federal circuit courts on the same matter. Rather does it stand firmly on both Illinois and Federal law and is in conformity in all respects with such laws.

An examination of the very Illinois decisions cited by petitioner will disclose no inconsistencies in the opinion of the Circuit Court of Appeals for the Seventh Circuit or in the Findings and Conclusions of Law of the United States District Court for the Southern District of Illinois

with these Illinois decisions. This being true, there is no unconstitutional assumption of power by the federal courts and the petition for certiorari should be denied.

Respectfully submitted,

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BRIEF AND ARGUMENT

in Support of Respondent's Reply to the Petition for a Writ of Certiorari.

SUMMARY.

I.

The Opinions of the Circuit Court and the District Court Do Not Establish an Unwritten "General Rule" of the Law of Trusts Contrary to the Common Law and Applicable Local Law of Illinois.

An examination of the Findings of the District Court and the Opinion of the Circuit Court of Appeals will disclose no new unwritten "general rule" of the law of trusts. Both the Federal Courts, including the Supreme Court of

the United States and the State Courts of Illinois, have consistently held that a trust may be revoked by the consent of the parties. The record in this case discloses that both the District and Circuit Courts found, as a matter of fact, that the petitioner consented to the revocation and destruction of the trust created by her father, and that by her conduct for almost ten years after the destruction of the trust and prior to the death of her father she acquiesced therein. The contention of the petitioner that there was "no consent from beneficiaries for destruction of the trust," which appears on page 15, is purely argumentative and contrary to the Findings of Fact by both the District and Circuit Courts. It is not grounds for certiorari under Section 240 of the Judicial Code, as amended (Title 28, U. S. C. A. 347).

II.

The Rule of Estoppel Against the Petitioner Was Proper, Both Under the Law of Illinois and Under the Decisions of the Federal Courts.

Petitioner was permitted to testify fully in the case and the Trial Court heard her testimony. The opinion does not indicate that the Court allowed any objection made to her competency as a witness. It held simply that there was evidence in the record sufficient to sustain a Finding of Fact that she had knowledge of the revocation and destruction of the Trust and that by her conduct for a period of ten years she had acquiesced in such revocation. The evidence as to this knowledge and acquiescence was both documentary and oral. Again, both District and Circuit Court concurred in Findings of Fact concerning the knowledge and acquiescence, by conduct on the part of the petitioner.

III.

The Decision Does Not Reestablish the Rule of Swift v. Tyson; the Decision Does Not Overrule the Doctrine of Erie R. Co. v. Tompkins.

The decision must speak for itself. We submit that it announces no new "General Rule" of law contrary to the local law of Illinois.

IV.

Erie R. Co. v. Tompkins Suggests Grave Discrimination by Petitioner Against Respondents.

The record in this case discloses that the petitioner has more than had her day in court. The issues involved in this controversy, or some phase of them, have been tried in the Probate Court of Madison County, Illinois, in the Circuit Court of Madison County, Illinois, in the U. S. District Court for the Southern District of Illinois, and in the U. S. Circuit Court of Appeals for the Seventh Circuit. The holdings of all of these courts have been uniformly against the petitioner.

ARGUMENT IN SUPPORT OF RESPONDENTS' REPLY.

I.

The Opinions of the Circuit Court and the District Court Do Not Establish an Unwritten "General Rule" of the Law of Trusts Contrary to the Common Law and Applicable Local Law of Illinois.

The decisions of both the District Court and the Circuit Court of Appeals are fully set out in the record (District Court, R. 229 through 233; Circuit Court of Appeals, R. 251 through 256).

The decisions of both courts found only that the grantor, August Luer, had revoked the trust which he had created, and that his daughter, the petitioner herein, had, by her conduct, accepted such revocation (R. 231) and was, by her conduct, estopped from now asserting the existence of a valid trust (R. 233).

The Illinois cases relied on by the petitioner, and cited frequently in her petition and brief as voicing the local law, are:

Harris Trust & Savings Bank v. Morse, 238 Ill. A. 232 (Erroneously reported in Petition on p. 9 as 238 Ill. 232);
Williams v. Evans, 154 Ill. 98;
Hubbard v. Buddemeier, 328 Ill. 76.

Respondents do not deny the law of Illinois to be as expressed in these cases, viz., that a trust perfectly created is irrevocable. The instant decisions of the District and Circuit Court of Appeals neither ignore nor transcend that rule of law. Indeed, they expressly follow the rule laid down in Williams v. Evans, supra, that:

> "Where the beneficiaries of a trust are all competent to act and the trust estate is subject to no future

contingencies, and the beneficiaries have an absolute right to the trust estate, the trust may be terminated by a contract of all the beneficiaries."

The only rule of law followed by the District and Circuit Court of Appeals in this case is well expressed in Restatement of the Law, Volume on Trusts, sec. 219, as follows:

"(1) The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable.

"(2) The beneficiary is not barred merely by the lapse of time from enforcing the trust, but if the trustee repudiated the trust to the knowledge of the beneficiary, the beneficiary may be barred by laches from enforcing the trust. (Such repudiation need not be in specific words; it may consist of conduct on the part of the trustee inconsistent with the existence of the trust.)"[1]

The Supreme Court of Illinois, in the case of Simpson v. Manson, 345 Ill. 543, not only laid down the rule in Illinois, but pointed out the complete harmony between the local and the "general law" as expressed by the Supreme Court of the United States. At page 554 it is said:

"Story said (3 Story's Eq. Juris., 14 Ed., Sec. 1973) 'It is often suggested that lapse of time constitutes no bar in cases of trust. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and cestui que trust is acknowledged to exist between the parties and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the cestui que trust. But **where this relation is no longer admitted to exist** (emphasis ours), or time and long acquiescense have obscured the nature and character of the

1 Annotations on (1): Whittaker v. City of Carbondale, 55 F. Supp. 72; (2) Horne v. Ingraham, 125 Ill. 198; Dowland v. Staley, 201 Ill. A. 6; Albrecht v. Wolf, 58 Ill. 186; Simpson v. Manson, 345 Ill. 543, etc.

> trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust.' Approval of this principle was voiced by this court in Benson v. Dempster, 183 Ill. 297, where we also quoted the following from Hammond v. Hopkins, 143 U. S. 224: 'The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transaction complained of, or of the witness or witnesses, or by reason of the original transaction having become so obscured by time as to render the ascertainment of the exact facts impossible.' . . ."

In view of the foregoing, Augusta M. Turner, the petitioner herein, can hardly expect to persuade this Court to believe that the District and Circuit Court of Appeals have announced a new "general rule" of the law of trusts when the opinion of the Circuit Court says simply:

> "The trial court also found that plaintiff had knowledge of the revocation of the trust and acquiesced therein. . . . In support of this finding and this conclusion Judge Briggle discusses the evidence of plaintiff's participation in the meetings of the corporations, the stock of which constituted the corpus of the trust. She knew that her brothers did not participate as trustees. The stocks of these companies were listed in the inventory of her father's estate and she made no protest thereto; nor did she protest the sale of such stocks or the report of their sale" (R. 255).[2]

---

[2] As to her knowledge of the termination of the trust, the court was doubtless influenced by the fact that the plaintiff must have learned of said cancellation from her attendance of the stockholders' meetings. It was perhaps equally impressed by the testimony of the vice-president of the local bank who told of the visit of the Turners, after the death of the father, seeking from him some documents the nature of which they were not certain. He called it a "hunting expedition." He enumerated many documents in an attempt to ascertain the nature of the instrument they were seeking and asked if it were a trust and "They said no, **that has been cancelled out a long time ago.** Mr. Turner made that statement. 'Q. In the presence of Mrs. Turner? A. Yes, sir'" (R. 255).

Of course this is not a new "general rule" of the law of trusts. Rather, it is a "recital of . . . evidence . . . to show there was substantial evidence to support both findings, either of which necessitated a decree for the defendants" (R. 256).

II.

The Rule of Estoppel Against the Petitioner Was Proper, Both Under the Law of Illinois and Under the Decisions of the Federal Courts.

Although the petitioner, Augusta M. Turner, denied that she had any knowledge of the revocation and destruction of the trust created by her father until after his death, there is substantial evidence in the record, both documentary and oral, to the contrary. The trust was destroyed in December of 1932 and the trust property restored to her father, August Luer, in January of 1933. Nine years and nine months later, August Luer died.

During the years preceding his death he was active in all his business affairs. One of the comapnies in which petitioner owned stock was Luer Building Company. She attended stockholders' meetings after the destruction of the trust, signed waivers, proxies, and conferred with her father concerning the meetings (R. 110, 111, 112, 113). None of the former trustees attended any of these meetings or signed any of the waivers, although some of them began with the statement—"We, the undersigned, being **all** of the stockholders of Luer Building Company, a corporation, etc." (R. 189, 191).

The rule in Illinois with reference to such situations is stated in Brown v. Brown, 154 Ill. 35, at 43:

> "But independently of other considerations, the laches of complainants precludes a recovery. Where a party has slept upon his rights or acquiesced for a

great length of time a court of equity will refuse relief. . . . The complainants pretend ignorance of the fact that the defendant was claiming under the deed. . . . They also knew, or by the exercise of ordinary diligence might have known, that the defendant was in the control of the property under the deed. There was no excuse for a want of knowledge that the defendant was claiming under the deed. . . . After learning of that fact, he allowed seven years to intervene before bringing an action. The delay was inexcusable."

The record discloses that prior to the trial in the District Court the attorneys for the petitioner took extensive depositions which they stipulated could be read in evidence. One of those depositions was that of C. A. Caldwell, retired, who, in 1930 and 1931 was president of Alton National Bank, and in 1933, president of First National Bank & Trust Company of Alton. This bank held the $30,000 note of M. E. Turner, husband of the petitioner, the endorsement of which caused August Luer to revoke the trust. Mr. Caldwell testified that he and his bank had learned of the trust (R. 222). He was asked by counsel for the petitioner:

"Q. Do you know whether it contained any provisions relative to whether it could be revoked?

A. I have no idea excepting that they told us when we raised the objection to it that it had been revoked.

Q. Who told you that? Do you remember?

A. I believe it was Mr. Turner" (R. 223).

The courts in Illinois have repeatedly expressed themselves about such situations. In Dempster v. Rose Hill Cemetery Co., 206 Ill. 261, at page 271, it was said:

"One important principle involved in the term 'laches' is that after a long lapse of years during which testimony is impaired or destroyed, witnesses

remove or die . . . and papers, letters, documents, books, records, etc., are lost or destroyed . . . the defendant is at the complete mercy of any claimant who may wish to take advantage of the situation. Time impairs and destroys evidence of the true facts and makes it practicably impossible to meet positive testimony of the complainants, whether the same be true or untrue. A court of equity, therefore, finding itself unable to render substantial justice between parties, asserts the principle of laches on the ground of public policy and for the repose of property rights."[3]

This, also, is the rule in the Federal Courts. It has been held that:

"It is true, as a general rule, that when the relation of trustee and cestui que trust is uniformly admitted to exist, and there is no assertion of adverse claim of ownership by the trustee, lapse of time can constitute no bar to relief. But when the trust relation is repudiated, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief on the ground of lapse of time and its inability to do complete justice."

Philippe v. Philippe, 115 U. S. 151;
Hammond v. Hopkins, supra;
Grymes v. Sanders, 93 U. S. 55, at 62;
Laughlin v. Mitchell, 121 U. S. 411.

In Laughlin v. Mitchell, supra, Mr. Justice Blatchford said:

"To wait until after his death, and until after the death of most of the persons who could have had any knowledge of the transactions, and after her father

3 Other Illinois decisions — Benson v. Dempster, 183 Ill. 297, 311; Shovers v. Warrick, 152 Ill. 355, 360; McDearmon v. Burnham, 158 Ill. 55, 62; Moore v. Taylor, 251 Ill. 468; Carlock v. Carlock, 249 Ill. 330, 339; Neagle v. McMullen, 334 Ill. 168, 182.

had, by will, disposed of his estate, presumably in some respects, in a manner otherwise than he would have done had he not believed himself possessed of this property, and then attack his will, would be inequitable and unjust."

III.

The Decision Does Not Re-establish the Rule of Swift v. Tyson; the Decision Does Not Overrule the Doctrine of Erie R. Co. v. Tompkins.

In January, 1842, Mr. Justice Story delivered an opinion in the case of Swift v. Tyson which announced as a rule of the Supreme Court of the United States that "Undoubtedly, the decisions of local tribunals upon such subjects are entitled to, and will receive the most deliberate attention and respect of this Court; but they cannot furnish positive rules or conclusive authority, by which our own judgments are to be bound up and governed."

In the years that followed a great deal of confusion resulted from the application of this rule. It was said that the injustice and confusion incident to the doctrine were repeatedly urged as reasons for abolishing or limiting jurisdiction of the Federal Courts on the ground of diversity of citizenship.

In the Cornell Law Quarterly for June, 1928, appeared an article by a professor of law at Harvard Law School, entitled "Distribution of Judicial Power Between United States and State Courts." The professor was Felix Frankfurter. The article said, in part (p. 525, 526):

> "The various types of diversity litigation call for concrete scrutiny in the light of present-day conditions and the demands upon federal courts by peculiarly federal litigation. The right to remove to the federal court a litigation between two non-residents in a state court will not survive analysis. . . . Whatever is to remain of diversity jurisdiction, the law to

be administered by the federal courts is the law of the states. Whenever that law is authoritatively declared by the state, either by legislation or by adjudication, state law ought to govern in state litigation, whether the forum of application is a state or federal court. Swift v. Tyson, with all its offspring, is mischievous in its consequences, baffling in its application, untenable in theory, and, as Mr. Charles Warren recently proved, a perversion of the purposes of the framers of the First Judiciary Act. It results in two independent lawmakers within the same state emitting conflicting rules concerning the same transactions. The fortuitous circumstances of residence of one of the parties at the time of suit determines what rule is to prevail in a particular litigation."

In the case of Erie R. Co. v. Tompkins, 304 U. S. 64, Mr. Justice Brandeis began his opinion—"The question for decision is whether the oft-challenged doctrine of Swift v. Tyson shall now be disapproved," and the rule of Swift v. Tyson was repudiated.

The petition for certiorari of Augusta M. Turner in this case rests solely on the representation that the decision of the Circuit Court of Appeals for the Seventh Circuit would re-establish the rule of Swift v. Tyson.

It is respectfully submitted that this is not so. As has been pointed out, petitioner apparently does not understand the law of trusts. She says it is the law of Illinois that a trust once perfectly created cannot be revoked unless the power of revocation is expressly reserved. This is true as far as the instrument or trust itself is concerned. But courts of equity, including those in Illinois, have uniformly held that an irrevocable trust may nevertheless be revoked by the agreement of the parties (Williams v. Evans, supra, etc.).

The decision of the Circuit Court complained of by the petitioner does not establish any presumptions whatever. It concurs with the decision of the District Court of the

United States for the Southern District of Illinois in a finding of fact, viz., that a trust was created by August Luer in 1930 and revoked by him in 1932 with the knowledge and consent of the petitioner, Augusta M. Turner, one of the beneficiaries of the trust.

If the findings of fact by the District Court, concurred in by the Circuit Court of Appeals for the Seventh Circuit, are correct, the petitioner has no cause of action. We submit that these findings are substantially supported by the record.

Where findings of fact are concurred in by both the District Court and the Circuit Court of Appeals this court will hesitate to disturb them.

IV.

Erie R. Co. v. Tompkins Suggests Grave Discrimination by Petitioner Against Respondents.

In that case, the Court said:

> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. Swift v. Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right would be determined was conferred upon the non-citizen."

In footnote 9, in connection with the foregoing, the Court observed:

> "It was even possible for a non-resident plaintiff defeated on a point of law in the highest court of a State nevertheless to win out by taking a non-suit and renewing the controversy in the federal court (citing examples)."

Applying these suggestions to the record in this case, the position of the petitioner does not appear in a favorable light. The record discloses that this is the fifth tribunal in which this controversy, or some phase of it, has been aired.

1. The answer of the intervening-respondent, Alton Banking and Trust Company, alleges that prior to filing her action in the United States District Court, all of the trust property was inventoried as assets of the estate of August Luer in the Probate Court of Madison County, Illinois, and notice of the proceedings was given to the petitioner; that on the filing of a petition to sell the assets at public sale the petitioner appeared in said court, obtained several continuances; that she had knowledge and information that among the assets was the stock conveyed in the trust instrument; that notwithstanding such knowledge and information, she did not protest, but allowed the stock to be sold, and that she did not thereafter file any objection to the sale or the approval thereof by the said Probate Court of Madison County, Illinois (R. 41 through 44).

The District Court made a finding of fact substantially as above (R. 232) and the Circuit Court of Appeals concurred in such finding (R. 255).

2. The answer of the respondents herein alleges that the petitioner, prior to filing her action in the United States District Court, intervened in a certain cause of action in the Circuit Court of Madison County, Illinois, which was then pending, and in said cause of action the petitioner sought to have certain judgments in the said Circuit Court of Madison County, Illinois, vacated; that in support of her motion to vacate the said judgments, the petitioner attached her affidavit reciting in effect all the matters which are alleged and set forth in petitioner's complaint and amended complaint in this cause of action; that in the

proceedings in the said Circuit Court of Madison County, Illinois, her motion was denied and that she has not prosecuted any appeal from the order denying her motion (R. 14, 31 through 36).

The District Court made a finding of fact substantially as above (R. 232).

3. The District Court in his findings of fact did not hold that the activities of the petitioner in the state courts of Illinois prior to filing her suit in the federal court constituted an estoppel, but he undoubtedly did conclude that such activities were further evidence of the knowledge of the petitioner of the revocation of the trust and of her acquiescence therein.

Surely here, the suggestion in Erie R. Co. v. Tompkins comes to full flower—"the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen."

What better illustration of footnote 9 that—"It was even possible for a non-resident plaintiff defeated on a point of law in the highest court of a state nevertheless to win out by taking a non-suit and renewing the controversy in federal court," could be pictured than the case at bar. Except, of course, that the federal courts in this case have followed the rule in Erie R. Co. v. Tompkins, applied the local law, and the petitioner has not won out.

4. The decision of the Circuit Court of Appeals for the Seventh Circuit made only one statement of law in its decision:

> "The recital of the foregoing evidence is merely to show there was substantial evidence to support both findings, either of which necessitated a decree for the defendants.
>
> "The judgment is affirmed" (R. 256).

5. On the basis of the foregoing record this Court now is asked to grant a Writ of Certiorari to correct an alleged "unconstitutional assumption of powers by the federal courts of the United States" (Petitioner's Brief, p. 27).

CONCLUSION.

This is not a case where the doctrine or dicta of Erie R. Co. v. Tompkins sits comfortably on either side. It was difficult in pointing out the failure of the petitioner, for the respondents to resist the opportunity to suggest some pertinent application of the dicta in the Erie case to the case at bar. We apologize for having done so.

This is a case in equity and the issues, in one form or another, have been presented in the Probate and Circuit Courts of Madison County, Illinois, in the United States District Court for the Southern District of Illinois, and in the United States Circuit Court of Appeals for the Seventh Circuit.

The issues as presented by the pleadings and the evidence, in the final analysis, were entirely issues of fact. On these issues of fact both the District Court and the Circuit Court of Appeals have concurred.

Wherefore, the Writ of Certiorari should be denied.

Respectfully submitted,

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